No. 3106.

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Frank Beyer,
Plaintiff in Error,
vs.
United States of America,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

ROBERT O'CONNOR,
United States Attorney;
CLYDE R. MOODY,
Assistant United States Attorney,
Attorneys for Defendant in Error.

Parker & Stone Co., Law Printers, 238 New High St., Los Angeles, Cal.

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STATEMENT OF FACTS.

Plaintiff in error has omitted to make a statement of the case to the court in his brief, and in order that the court may more easily comprehend what this case is about, we will make a brief statement of the evidence.

The indictment charges that the plaintiff in error, with certain other defendants, named and unnamed, conspired to transport certain women and girls from the United States to Mexico for the purpose of de-

bauchery, the manner in which said debauchery was to be effected being more fully described in the said indictment.

The evidence, in brief, of the government showed that the defendants were the owners or proprietors of a certain building in Mexicali, Mexico, in which building they were conducting a bar, a gambling hall, a dance hall, a cafe and a house of prostitution. The defendants who were convicted, including the plaintiff in error, were the recipients of the profits of all of the various businesses conducted in the said building. The prosecution, among other witnesses, called several women and girls who were transported from Los Angeles, California, to Mexicali, Mexico, by the defendants, and whom it is alleged the defendants conspired to transport for the purpose of debauchery. From their testimony it developed that during the spring of 1916 the defendants hired them in Los Angeles, California, to go to the institution above described in Mexicali, Mexico, there to act as entertainers in the above described establishment, and the defendants furnished transportation for at least some of these women.

The duties of these entertainers were to sing, dance, appear in a chorus act and to give other theatrical performances; to dance with the male habitues of this place and to sell intoxicating liquors to such habitues, from the sale of which they were to derive a profit of from forty to fifty per cent of the selling price. The witnesses testified that it was optional with them as to whom they might dance with and as to their sale of liquor.

Back of the dance floor was a door leading into a hall, upon both sides of which hall were rooms occupied by prostitutes. The first door leading from the hall was a dressing room used by the entertainers in changing their costumes. The prostitutes were permitted upon the dance floor, in the cafe, at the bar, and other places where the entertainers were. Each of the witnesses for the government was required to sign a contract, which contracts were practically alike, and a copy of which is set out in the transcript at page 155. They were further instructed that in the event any of the male patrons of this establishment should approach them and make improper suggestions to them, they were to say that they were not there for that purpose, but that there were others there, meaning, of course, that there were others there for the purpose of prostitution. [Tr. pp. 83-102-105 and 106.]

One of the witnesses for the Government, Alma Person, was a girl seventeen years old at the time she was taken to Mexicali, Mexico [Tr. 115], and another, Grace Covert, was eighteen years old [Tr. 135].

ARGUMENT.

I.

Point No. 1 argued by plaintiff in error in his brief, to the effect that "Where the definition of the offense created by a statute includes generic terms, it is not sufficient to charge the offense in the language of the statute, but it is essential that the indictment descend to particulars and specify the acts which bring the defendant within the purview of the statute," is suffi-

ciently answered by a careful reading of the indictment in this case and by the case of Athanasaw v. United States, 227 U. S. 326. The indictment in the present case charges that the defendants conspired to transport women and girls from the United States to Mexico for the purpose of debauchery, and thereupon proceeds at great length to describe the manner in which the debauchery should take place. An environment is described and certain duties of the women outlined, and the question as to whether this environment and these duties were such that they would naturally lead to the personal sexual debauchery thus suggested to them was one entirely for the jury. The indictment meets the demand of the plaintiff in error that it descends to particulars, et cetera.

The court in the Athanasaw case upheld an indictment alleging that the transportation was for "the purpose of debauchery" or "to give herself up to debauchery," and nothing there is said to indicate that the indictment descended to particulars. The court in the course of its opinion said:

> "The instructions of the court were justified by the statute. It is true that the court did not give to the word debauchery or to the purpose of the statute the limited definition and extent contended for by defendants, nor did the court make the guilt of the defendants to depend upon having the intent themselves to debauch the girl or to intend that some one else should do so. In the view of the court the statute had a more comprehensive prohibition, and was designed to reach acts which might ultimately lead to that phase of debauchery which consisted in 'sexual actions.' The general

expressions of the court, however, were qualified to meet and not go beyond the conduct of the defendants. The court put it to the jury to consider whether the employment to which the defendants called the girl and the influences with which they surrounded her tended 'to induce her to give herself up to a condition of debauchery which eventually and naturally would lead to a course of immorality sexually.' That question, the court said, the jury should determine, and further, 'You have heard the testimony in the case in regard to the circumstances in which she was placed. You have viewed the scene where she was employed. You have examined by the testimony and your observation what was the character and what was the condition or influence in which the girl was placed by the defendants. Was or was not it a condition that would necessarily and naturally lead to a life of debauchery of a carnal nature relating to sexual intercourse between man and woman?' "

The court further stated:

"And granting the testimony to be true, of which the jury was the judge, the employment to which she was enticed was an efficient school of debauchery of the special immorality which defendants contend the statute was designed to cover."

From our reading of the Athanasaw case we feel justified in asserting that it is in all particulars as near like the present case as it is possible for one case to be like another. In each instance theatrical people were transported into a questionable environment, and the ability of that environment to accomplish the com-

mon design of the conspirators was rightfully a question which was left to the jury. The essential difference between the Athanasaw case and the case at bar is that in the Athanasaw case the woman was actually solicited to have immoral relations, while in the present case the conspiracy had progressed at the time of the arrest no further than the placing of the woman in the questionable environment. But the description in the indictment of that environment was such that the natural and ordinary consequences of same and the duties required of these women would inevitably result in their becoming subjected to such solicitations and eventually be debauched in the manner contemplated by the statute, namely, "sexually debauched." To use the words of the court in the Athanasaw case, the "efficient school of debauchery of the special immorality contended for" was just such an institution as is described in this indictment.

The indictment may also be sustained from another point of view. These women and girls were transported or placed in this house in Mexicali with another object, to-wit, of making the house as alluring and attractive to the public as possible and to draw as many patrons to the house as possible, particularly male patrons, as such entertainment and duties as these girls were supposed to perform would have small attraction for women patrons. After the male patrons should be so attracted to this place by these entertainers and in a manner become familiar with the various forms of vice therein practiced, it follows that the management intended that they should visit the pros-

titutes, from whom the management derived a portion of its profits. Therefore the women and girls so transported were to become one of the efficient means for maintaining what is perhaps the most offensive form of evil against which the statute is expressly directed. (See Simpson v. United States, 245 Federal 278, 280.) These women were therefore assisting, by their actions and presence, the vilest kind of sexual debauchery, and can it be said that one who is procured to attract and entice others into a house of prostitution is not on the road to herself becoming debauched in the most carnal sense? The case of Simpson v. United States, *supra,* was one where the woman transported was installed as a mistress in a house of prostitution, but no immoral acts were shown upon her part, yet this court sustained the conviction in this case and the Supreme Court of the United States refused a writ of certiorari to review such case. (U. S. Supreme Court Advance Opinions, 1917, No. 4, page 161.)

II.

Point No. 2, argued by plaintiff in error in his brief, is sufficiently answered by the statement of facts in the case and the argument on point No. 1. The case of Athanasaw v. United States and Simpson v. United States, *supra,* entirely answer all of the objections raised by plaintiff in error under this point. The only new point argued under this heading is that the indictment did not contain an allegation that the acts set out should bring about the commission of acts of debauchery, but it is plain from the quotations cited above from the Athanasaw case that it was only neces-

sary for the jury to determine whether or not the environment would naturally and ordinarily lead to the debauching of the victim. On page 14 of his brief plaintiff in error alleges that it was the intention of the prosecution in this case to charge the defendants, not with the consummation of the crime, but with an intent to commit a crime. Such is an erroneous view of the indictment, as the indictment charges a conspiracy and completes the charge of conspiracy by setting out an overt act. The doctrine is too well settled to admit of argument that the object of a conspiracy need not be successful in order that the crime of conspiracy may be consummated. The indictment sets out that the women and girls were actually placed in the questionable environment, and, according to the Athanasaw case in the quotation above cited, it was not necessary to allege that the defendants intended themselves to debauch the girls or that some one else should do so. Their offense was one of conspiring to place these girls in a position where, in the natural and ordinary course of events, they would become debauched.

III.

Point No. 3 argued by plaintiff in error in his brief purports to cite such instances of variations in the proof from the allegations in the indictment as to warrant the granting of defendant's motion in arrest of judgment. While the indictment does charge that the said girls were to solicit persons in said place and house to buy intoxicating liquors, and the proof does not in so many words conform to such allegations,

nevertheless these allegations are substantially proved, and that is all that is required of any material allegation in an indictment.

The women who testified for the Government each stated that they were to receive forty to fifty per cent on drinks sold by them, and that a material part of their compensation was to be so earned, and they further testified that they did sell drinks to the patrons of the said place and drank at the bar and at tables with them, receiving a per cent on the liquor, and the contract with the women, set out on page 155 of the transcript, mentions the sale by them of liquor and what percentage they were to receive.

While there is no direct testimony as to the actual personal contact with prostitutes, still there is testimony to the effect that the prostitutes were allowed on the dance floor, drank at the tables with the men and at the bar, and frequented the gambling hall. Therefore, there was material proof of the allegation that at all times when in the performance of their said duties these entertainers were to be subjected to the company and contact of the prostitutes.

IV.

In point No. 4 plaintiff in error confuses an indictment charging a conspiracy with an indictment charging the substantive offense. The indictment in this case charged a conspiracy, and the law is well settled that it is not necessary that the object of the conspiracy be successful in order that the conviction of a defendant may stand. In this case the indictment charges that

the defendants conspired to take the women and girls into a certain environment for the purpose of debauchery and then proceeds to describe the environment. If the jury found that this environment was such as would naturally lead to debauchery on the part of the women and girls, then they were justified in their verdict of guilty. The court was therefore right in charging the jury that the law is that the defendants intended the natural and necessary consequences of their act. The gist of the offense was whether or not these natural and necessary consequences of the acts of the defendants would result in the debauchery of the girls. If so, the defendants were guilty, and the presumption of law was properly stated by the court—that the defendants were presumed to intend the natural and necessary consequences of their acts. In the case of United States v. Pierce, 245 Federal 878, there is an enlightening discussion upon the intent that may be imputed to defendants from the natural and necessary consequences of their acts.

The instruction complained of is taken almost verbatim from the Athanasaw case with the exception of that part of the instruction of the Athanasaw case pertaining to intent, and on this subject the plaintiff in error has set out at the top of page 21 of his brief what purports to be the court's instruction as to intent. However, the entire instruction of the court was as follows:

"The conspiracy must have involved an intent to violate said act above referred to as the White Slave Act; that is to say, that the defendants intended that

the women which they would transport, if any, should be placed in a situation as described in the indictment, and hereafter referred to. What was the intent with which the women were to be taken to Mexicali? Was it that they should live an honest, moral and proper life, or were they to be taken to Mexicali for the purpose of entering upon a condition which might be termed debauchery, or which tends to, and which would necessarily and naturally lead them to a condition of debauchery?"

It will therefore readily be seen that the instruction on intent demanded by plaintiff in error was substantially given.

The offense in this case was sufficiently consummated to warrant the instruction of the court complained of, as the women and girls were actually placed in the environment which it then became the duty of the jury to decide was or was not of the character which would lead to the consequences heretofore enumerated. Athanasaw v. United States, *supra*.

V.

The argument of plaintiff in error on this point is directed towards the court's instructing the jury upon a point of fact without immediately calling to their attention that such instruction was not binding upon them. The court instructed the jury as follows:

"In this instruction I propose to comment to some extent upon the evidence introduced here, and I tell you that you are not bound by what I shall say concerning the weight to be given to the evidence, nor

bound by what I may say that it proves. You must determine that for yourselves. Your right, however, to determine the weight of the evidence and the credibility of the witnesses is not arbitrary, but must be exercised with legal discretion."

Thereafter, in the course of his instructions, he made the following remarks:

"If the defendants contracted with the women that they took there, to the effect that said women should not become prostitutes, or engage in prostitution, or if they advised the women what to do in the event they were solicited by men to sexual indulgence, or otherwise approached concerning debauchery; if the defendant guarded and protected said women against being approached concerning debauchery or indulgence in debauchery, to my mind that would be very strong evidence that the defendants knew that the surroundings and environment in which said women were to be placed would naturally lead to debauchery and immoral sexual relations."

The rule of law is well settled that a federal judge may comment upon the evidence, and in this instance the court protected the defendant from a misconception of their duty by the jurors by particularly instructing that they were not bound by his, the court's, views.

In the case of Parish v. United States, 247 Federal 40, reading from page 44, the court said:

> "It is not necessary to cite authorities in support of the proposition that the court had the right

to express an opinion as to the weight of evidence provided it ultimately submitted the facts to the jury to be passed on by them."

In this instance there is no evidence before the court that the jury were misled by the court's statement of its views, and undoubtedly if any member of the jury had been misled, counsel could and would have procured a statement from such juror to such effect to submit to the court.

In passing upon a case where error was alleged by the court admitting evidence and thereafter striking it out, the court, in the case of Pennsylvania Company v. Roy, 102 U. S. 451, quoting from page 456, said:

> "The charge from the court that the jury should not consider evidence which had been improperly admitted was equivalent to striking it out of the case. The exception to its admission fell when the error was subsequently corrected by instructions too clear and positive to be misunderstood by the jury. *The presumption should not be indulged that the jury were too ignorant to comprehend, or were too unmindful of their duty to respect instructions as to matters peculiarly within the province of the court to determine.* It should rather be, so far as this court is concerned, that the jury were influenced in their verdict by legal evidence. Any other rule would make it necessary in every trial where an error in the admission of proof is committed, of which error the court becomes aware before the final submission of the case to the jury, to suspend the trial, discharge the jury, and commence anew. A rule of practice leading to such results cannot meet with approval."

In this case it is not to be presumed that the jury were misled, but rather is it to be presumed that they were men of ordinary discretion and followed the court's instructions and decided the case in every manner as prescribed by law.

We therefore respectfully submit that the verdict of the jury and the judgment of the lower court should be sustained.

ROBERT O'CONNOR,
United States Attorney;
CLYDE R. MOODY,
Assistant United States Attorney,
Attorneys for Defendant in Error.